Supreme Court, U.S.
FILED
AUG 2 2 2003

No. 02-1735

In The
Supreme Court of the United States

CALIFORNIA TROUT, INC.,

Petitioner

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, SOUTHERN CALIFORNIA EDISON COMPANY

Respondents

On Petition For Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO THE BRIEFS IN OPPOSITION BY RESPONDENTS FEDERAL ENERGY REGULATORY COMMISSION AND SOUTHERN CALIFORNIA EDISON COMPANY TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioner California Trout Inc. (Petitioner) hereby replies to the Oppositions filed by Respondents Federal Energy Regulatory Commission (FERC) and Southern California Edison Company (SCE) to the Petition for Certiorari regarding the Ninth Circuit's Decision in this case. Petitioner submits the Decision--that FERC annual licenses under Federal Power Act § 15a1, 16 U.S.C. § 808a1 (FPA § 15a1) are not federal licenses subject to State water quality certification under Clean Water Act § 401a1, 33 U.S.C. § 1341a1 (CWA § 401a1)--is contrary to the plain language of the statutes, to this Court's governing decision in *Public Utility District No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) (PUD), to the U.S. Environmental Protection Agency's (USEPA) definition of "federal license or permit" under CWA § 401a1, to the Congressional history that CWA § 401a1 applies to renewals of existing licenses of federal agencies including FERC, and to the governing rules of statutory construction. This case presents a question of exceptional importance because of FERC's widespread issuance of annual licenses to hydropower projects with expiring long term licenses, thereby avoiding compliance with the water quality standards of the CWA. Petitioner respectfully requests that the Court grant certiorari, and issue an opinion which correctly determines that FERC annual licenses under FPA § 15a1 are federal licenses subject to State certification under CWA § 401a1.

II. ARGUMENT

The Court Should Grant Certiorari To Review The Ninth Circuit's Clearly Erroneous Decision that a FERC Annual License Under FPA § 15a1 Is Not a "Federal License or Permit" Subject to State Certification Under CWA § 401a1.

A. The Plain Language of FPA § 15a1 and CWA § 401a1 provides that a FERC annual license is a federal license subject to State certification. Respondents defend the Decision, contending that an

annual license is a ministerial, non-discretionary and mandatory extension of the original FERC license and not a license subject to CWA § 401a1. The Decision is contrary to the plain language of FPA § 15a1, which describes an annual license as a license, and of CWA § 401, which mandates State certification for all federal licenses including FERC annual licenses which may result in a discharge. (FERC 9)

FPA § 15a1 provides that upon expiration of an existing license, FERC may issue a new license to the existing licensee or a new licensee, provided that if the U.S. does not take over or issue a new license, then FERC "shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued...." CWA § 401a1 provides that "Any applicant for a federal license ... to conduct any activity...which may result in any discharge ..., shall provide ... a certification from the State" that the discharge will comply with the CWA, and "No license ...shall be granted until certification...has been obtained or waived..."

FERC's contention that FPA § 15a1 uses the word "shall" does not justify the exemption of an annual license under the FPA, adopted in 1920, from CWA § 401, adopted in 1972. The CWA likewise uses the word "shall" to require State certification for any federal license, and to prohibit issuance of any federal license without State certification. The plain language of FPA § 15a1 and CWA § 401a1 clearly provides that an annual license is a federal license subject to State certification. As stated in *PUD, supra*, and in *Alabama Rivers Alliance v. FERC*, 325 F.3d 290 (D.C.Cir. 2003), "...FERC's hydroelectric licenses are thus subject to... the requirements of Section 401 of the CWA..." *Id.*, at 292-4. Thus, issuance of a FERC annual license is subject to CWA 401a1's mandatory requirement of State certification.

B. This Court's Decision in *PUD* and the EPA's definition of federal license under CWA § 401a1

provide that FERC annual licenses are federal licenses subject to State certification.

Respondents erroneously contend there is no inconsistency between this case and this Court's decision in *PUD*, which they attempt to distinguish as involving a license to construct and operate a new hydropower facility and not a mandatory annual license extension under FPA § 15a1. (FERC, 10) In fact, this Court in *PUD*, *supra*, at 511 U.S. 723, declared that CWA § 401 State certification applies not only to "licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters..." The purpose of CWA § 401 is to require State certification for any federal license which may result in a discharge and impair U.S. waters, regardless of whether the license is mandatory or discretionary or for one year or 50 years. Respondents' purported distinction that under FPA § 15a1FERC "shall" issue an annual license if a new license or recapture has not been completed, constitutes no basis for exempting an annual license that may result in a discharge to U.S. waters from mandatory State certification.

The Courts in *PUD* and *American Rivers v. FERC*, 129 F.3d 99, 107 (2d Cir. 1999) and *Alabama Rivers, supra.*, have held that it is the USEPA, and not FERC, whose interpretation of the CWA is given deference. Respondents erroneously argue that the Ninth Circuit did not defer to FERC's interpretation of the CWA but rather decided the best reading is that CWA § 401a1 does not apply to a party receiving an annual license under FPA § 15a1. (FERC, 11n3) In fact, the Ninth Circuit wrongly afforded *Chevron* deference to FERC's holding that "the issuance of an annual license under 15a1 is a ministerial and nondiscretionary act...It is therefore not a licensing action that triggers the requirements of CWA. FERC's interpretation of § 15a1,...is entitled to Chevron deference,...." (Decision, 10A).

FERC erroneously argues that requiring CWA § 401a1 certification for annual licenses would undermine FPA §

15a1's purpose of avoiding a hiatus in operations of a power plant after expiration of its license. (FERC,10). In fact, States like California grant certification for FERC licenses with conditions to ensure compliance with water quality standards and do not shut down plants, as shown by California's filing with the Ninth Circuit and its certification of this Project with conditions once Respondent filed a sufficient application.

Respondents erroneously argue that EPA's definition of federal license in CWA § 401a1 does not specifically address non-discretionary license extensions under FPA § 15a1, and contains nothing inconsistent with FERC's determination that there is no "applicant" for an annual license for purposes of CWA § 401a1. (FERC, 11) In fact, CWA 401a1 requires State certification for all federal licenses which may result in a discharge. There is no reason for legislation requiring certification for all licenses to state that it includes nondiscretionary licenses. EPA defines "license or permit" under CWA § 401 as "any license or permit granted by an agency," without exception. 40 C.F.R. 121.1. This encompasses licenses which are discretionary or mandatory. Further, FERC's argument that CWA certification applies only to "applicants" for a federal license or permit is contrary to CWA § 401 and has been rejected by the only Circuit Court to have addressed it. CWA § 401a1 states that "No license or permit shall be granted until the certification...has been obtained or waived," without regard to an application. In *United States v. Marathon Development Corp.*, 867 F.2d 96, 99-101 (1st Cir. 1989), the Court rejected defendant's contention that CWA § 401 requires an "applicant" for a license, and held that CWA certification is required even though the Corps' nationwide permit does not require an application.

C. The Proper Interpretation of FPA § 15a1 and CWA § 401 under governing rules of statutory construction is that a FERC annual license is a federal license subject to State certification.

FERC asserts the Ninth Circuit correctly resolved any conflict between CWA § 401(a)1 and § FPA 15(a)1 by exempting FERC annual licenses from State certification. FERC argues the Court appropriately applied the cannons that the specific controls the general and implied repeals are disfavored, so FERC annual licenses issued under the supposedly specific FPA § 15a1 are not subject to CWA § 401a1 State certification required for all federal licenses. (*FERC*, 12-13).

In fact, the Ninth Circuit's Decision that FPA § 15a1 cannot be harmonized with CWA § 401 by subjecting annual licenses to State certification is an improper construction of the statutes under this Court's governing rules of construction. FPA § 15a1 is not a specific provision to be favored over CWA § 401's requirement of state certification for all Federal licenses of activities which may result in a discharge. FPA § 4(e) authorizes licenses to construct, operate and maintain hydro projects, and FPA § 15a1 authorizes annual licenses and new licenses to existing licensees, and new licenses to new licensees. Annual licenses are renewals of existing licenses which Congress declared are subject to State certification. (See II E, infra).

Contrary to Respondents' contention, subjecting annual licenses under FPA § 15a1 to State certification under CWA § 401 would not partially repeal FPA § 15a1. Annual licenses--like other FERC licenses--would be issued, subject to State certification and conditions therein. This Court in *PUD*, *supra*, held that FERC licenses were subject to State certification, yet no one argued that the FPA provisions authorizing FERC licenses (FPA § 4e, 15) had been repealed. Conversely, the Ninth Circuit's mistaken interpretation that FERC annual licenses are not federal licenses subject to State certification partially repeals CWA § 401 as to the hundreds of annual licenses issued by FERC.

The courts have consistently rejected FERC's attempts to exempt FERC licenses from the CWA as unauthorized. In *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 47, 53,

n. 116-117 (D.C. 1987), the Court rejected the contention that an exception to CWA permits for FERC licenses should be inferred on the ground that "Congress could not have intended to interfere with the jurisdiction of the FPC." *Monongahela* held that "congressional intent would be betrayed by implication of an exemption of FPC-licensed hydroelectric projects from the express requirements of the (CWA)...We do not view this as a 'repeal' of FPC authority but as a reconciliation necessary to ensure the protection of a vital national interest...we are advertent to the maxim that repeals by implication are not favored...By giving appropriate effect to both statutory provisions, however, we repeal no legislation; on the contrary, we fulfill congressional intent." See also *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162, 171(S.D.N.Y. 1973), aff'd 499 F.2d 127 (2d Cir. 1974); *Appalachian Power Co. v. United States*, 607 F.2d 935, 939-942 (Ct.Cl. 1979).

The appropriate rules of construction are that when two statutes are capable of coexistence, it is the duty of the courts absent a clearly expressed congressional intent to the contrary, to regard each as effective, but where provisions in two statutes conflict, the latter to the extent of the conflict constitutes an implied repeal of the earlier one. See *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 102-3 (9th Cir. 1981). Thus, the proper interpretation of the 1920 FPA, which authorizes FERC annual licenses, is qualified by CWA § 401a1 of the subsequently enacted 1972 CWA, which conditions all federal licenses which may result in a discharge -- including FERC annual licenses -- on State certification. The Ninth Circuit's contrary interpretation exempting FERC annual licenses from CWA § 401a1 is clearly erroneous.

D. The Ninth Circuit's reliance on *Platte I and II* and *Lac Courte*, which interpreted FPA § 15a1 but not CWA § 401al, is misplaced.

The 3 cases cited by the Ninth Circuit—*Platte River Whooping Crane v. FERC,* 876 F2d 109 (D.C. Cir. 1989), *Platte River Whooping Crane Trust v. FERC,* 962 F2d 27 (D.C. Cir. 1992), and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Fed. Power* Comm'n, 510 F2d 198 (D.C. Cir. 1975) --- (*Platte I* and *II* and *Lac Courte)*—do not support the contention that a FERC annual license is not a federal license subject to CWA § 401a1. Those cases did not involve State certification under CWA § 401 for FERC licenses. None suggests that an annual license is not a license or a licensing action, but rather describe the annual licenses as "licenses."

In *Platte I,* the Court stated that "while the issuance of the annual licenses is indeed a nondiscretionary act...the commission does have the authority to formulate conditions for both licenses." *Id.*, at 876 F.2d 114, 117. In *Platte II,* supra, at 962 F.2d 33n.2, the Court upheld FERC's imposition of conditions on an annual license with a reopener but not on one without a reopener, deferring to FERC's interpretation that FPA § 4(e) and 10 apply to new licenses and do not trump FPA § 15a1's provision that annual license issue under the terms of the existing license.

In *Lac Courte*, supra, the Chippewa Indians sought review of the FPC's decision under FPA § 15a1 to grant an interim annual license despite the Band's refusal to consent to further use of tribal lands underlying the Project. The Court held the FPC was required to issue annual licenses to the licensee pending the U.S. decision whether to recapture the Project under FPA § 14. *Id.*, at 510 F.2d 201 n 7, 206. The Ninth Circuit incorrectly equated the Band's asserted veto power in *Lac Courte* against FERC licenses on its tribal lands under an 1854 Treaty, with Congress' express grant of veto power to the states under CWA § 401a1 against federally licensed activities that may result in a discharge. (Decision, 10A, N. 6) However, in *Lac Courte,* Congress was empowered to abrogate prior treaties or statutes concerning Indian tribal lands by recapture of the Project. *Id.* In contrast, State certification is based on the

subsequently enacted CWA, which empowers the State to certify or veto all federal licenses issued under any statute.

None of these cases arose under or presented the question of whether the issuance of annual licenses under the FPA of 1920 is subject to State certification under the CWA of 1972, as this case does. The pertinent decisions are those requiring State Certification of all FERC licenses which may result in a discharge to US waters. See *PUD*, *supra*, at 511 U.S. 723; *Alabama Rivers*, *supra*, at 325 F.3d 304-5 (amendment to FERC license to replace generators increasing flow rate of water may result in a discharge requiring State certification under CWA § 401a1). The criterion for determining whether State certification is required is whether the licensed activity may result in a discharge. *PUD*, *supra*, at 511 U.S. 709, 723; *Alabama Rivers*, *supra*, at 325 F.3d 304-5; CWA § 401a1. The annual licenses renewing SCE's license may result in a discharge and are subject to State certification under CWA § 401a1.

E. Congress Declared That Certification under CWA § 401a1 is required for renewals of existing federal licenses such as FERC annual licenses.

Respondents argue that FERC annual licenses are not renewals of existing licenses which Congress subjected to State certification under CWA § 401. FERC contends that although CWA § 401a1's Congressional history mentions "renewals of existing licenses" and FPA § 15a1 refers to "New licenses and renewals," Petitioner offers no reason Congress contemplated a linkage between CWA § 401a1 and FPA § 15a1. (FERC, 13).

In fact, Congress declared in adopting CWA § 401 that all federal licenses of activities which may result in a discharge require State certification, including renewals of existing FERC licenses. In adopting CWA § 401a1's predecessor, Congress stated that "The provisions of this section are intended to apply to renewals of existing licenses or permits for any activities which discharge into the navigable waters of the United States." U.S. Code Cong. & Admin. News (1970), pp. 2697, 2711. In readopting CWA § 401a1, Congress stated that "the

Purpose of the certification mechanism ...is to assure that Federal licensing or permitting agencies cannot override State water quality requirements...the Committee continues the authority of the State...to deny a permit and thereby prevent a Federal license or permit from issuing...Should such an affirmative denial occur no license or permit could be issued by such Federal agencies as the...Federal Power Commission..." U.S.Code Cong. Admin. News (1972), p. 3735.

Congress' declaration that CWA § 401a1 applies to "renewals of existing licenses or permits" of federal agencies such as the FPC, applies to FPA § 15a1, which describes FERC annual licenses as "renewals" of existing licenses. Section 15, titled "New licenses and renewals," provides inter alia for issuance of new and annual licenses to existing licensees, which are renewals. Congress and the Courts refer to annual licenses as "annual renewals." In 1968 Congress stated that pending Congress' decision whether to recapture a FPC Project "there would be an annual renewal of the expired license." See *Lac Courte, supra,* at 510 F.2d 201n7, 206; See also *City of Oconto Falls v. FERC,* 204 F.3d 1154, 1156n4 (D.C. 2000) ("the commission had issued annual renewals of the...license under...16 U.S.C. § 808(a)1." Thus, Congress' declaration that CWA § 401a1 applies to "renewals of existing licenses" clearly applies to annual license renewals under FPA § 15a1.

F. FERC's Belated issuance of a new 30-year license does not moot this case.

Respondents erroneously argue that FERC's belated issuance of a new license in July 2003, after issuing 8 annual licenses without State certification, renders this case moot. However, FERC does not affirm that it will not issue annual licenses again on this project. (FERC 8, 13) Further, FERC's issuance of annual licenses to hundreds of FERC licensees with expiring licenses is a recurring violation of CWA § 401. FERC has 119 hydroelectric licensees in California, at least 44 of which are due to expire in the next 15 years. It has been FERC's practice

to issue annual licenses without State certification. (California's Response to FERC's Staff Report on Hydroelectric Licensing Policies, Procedures and Regulations, p. 6 (2001). Without certiorari, FERC will rely on the Ninth Circuit's erroneous decision to issue annual licenses without State certification to other California licensees.

This case warrants application of the capable of repetition, yet evading review exception to mootness, which is applicable where the challenged action is too short in duration to be fully litigated before its cessation or expiration, and there is a reasonable expectation that the plaintiff will again be subjected to the same action unless court intervention occurs. See *Roe v. Wade*, 410 U.S. 113, 125, (1973) *Déjà vu of Nashville v. Metropolitan Gov't of Nashville*, 274 F.3d 377, 389-391 (6th Cir. 2001), cert. denied,--U.S.--, 152 L.Ed.2d 855 (2002); *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189-190 (2000).

G. APA § 9(b) does not excuse FERC's unauthorized issuance of annual licenses without State Certification under CWA § 401a1.

FERC's contention that APA § 9(b) would have authorized the issuance of annual licenses without State certification is simply wrong. APA § 9(b) requires a timely and sufficient application for a federal license, which includes adequate applications for all state and local environmental permits for the federally licensed activity. See *Bankers Life & Casualty Co. v. Callaway*, 530 F.2d 625 (5th Cir. 1976). SCE's initial application for State certification was insufficient and denied in 1995.

III. CONCLUSION

Petitioner respectfully requests that this Court grant certiorari in this case.

Respectfully submitted,

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